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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter of	
Sprint Communications Company, L.P.	**CC Docket No. 98-62**
Petition For A Declaratory Ruling To Declare Unlawful Certain RFP Practices By Ameritech	

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to *Public Notice*, DA 98-849 (released May 5, 1998), hereby replies to oppositions filed by BellSouth Corporation ("BellSouth"), SBC Communications Inc. ("SBC"), and U S WEST Communications, Inc. ("U S WEST") (collectively, the "BOC Opponents") to the Sprint Communications Company, L.P. ("Sprint") Petition for Declaratory Ruling ("Petition") pending in the captioned proceeding.[1]

Sprint has sought in its Petition a declaratory ruling that a certain "teaming arrangement" that Ameritech Corporation ("Ameritech") had proposed to enter into with one or more providers of interLATA telecommunications services violates the restrictions imposed by Section 271 of the Communications Act of 1934 ("Act"), as amended by the Telecommunications Act of

[1] By *Public Notice*, DA 98-1183 (released June 18, 1998), the Commission consolidated the Sprint Petition with petitions filed by Ameritech and U S WEST seeking declaratory rulings that the "teaming arrangement" each petitioner has respectively entered into with Qwest Communications Corporation ("Qwest") is lawful. TRA will respond to the Ameritech and U S WEST petitions in a separate pleading.

1996 ("Telecom Act"), on Bell Operating Company ("BOC") provision of in-region, interLATA service, as well as the equal access and nondiscrimination requirements referenced in Section 251(g) of the Act.[2] The BOC Opponents urge the Commission to deny the Sprint Petition, arguing variously that (i) judicial interpretations of the terms of the Modification of Final Judgment ("MFJ") are not determinative of the reading that should be afforded Section 271(a)/(b), (ii) Commission precedent requires a narrow view of the term "provide" as used in Section 271(a)/(b), (iii) a "teaming arrangement" made available by a BOC to all interexchange carriers ("IXCs") is not violative of the Act's equal protection and nondiscrimination provisions, and (iv) the public interest would be well served by sanctioning "teaming arrangements" such as that which Ameritech, as well as U S WEST, have entered into with Qwest. The BOC Opponents are wrong on all counts.

The BOC Opponents do not, and indeed, could not, argue that the Ameritech "teaming arrangement" would not have violated the terms of the MFJ. As TRA pointed out in its Comments, Judge Harold H. Greene, emphasizing that the MFJ prohibited BOC provision of "interexchange telecommunications services," not merely BOC provision of "interexchange telecommunications," long held that the MFJ prohibition against BOC provision of interLATA services subsumed not "merely . . . transmissions from a point in one exchange area to a point in another exchange area, but also . . . activities that comprise the business of providing interexchange

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[2] 47 U.S.C. §§ 251(g), 271; Pub. L. No. 104-104, 110 Stat. 56, §§ 101, 151 (1996). TRA filed comments in support of the Sprint Petition on June 4, 1998, but addressed therein the actual "teaming arrangement" entered into by Ameritech with Qwest rather than the "teaming arrangement" outlined by Ameritech in its request for proposals ("RFP"). As TRA noted in its comments, the RFP "teaming arrangement" and the Qwest "teaming arrangement" are conceptually consistent; certain details, however, are different.

service."[3] And among the "integral parts of the interexchange business," as enumerated by Judge Greene, were "making selections of interexchange capacity," "marketing interexchange services," and providing customer service in conjunction with interexchange services.[4] Indeed, Judge Greene ruled that the term "provide" in the context of the MFJ "was synonymous with furnishing, marketing, . . . [and] selling."[5]

The BOC Opponents seek to avoid Judge Greene's clear rulings by arguing that these interpretations should not control the construction of Section 271(a)/(b). Judicial precedent as to this matter is clear. "When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the Courts."[6] Moreover, "[w]hen Congress enacts a law, it is presumed to be aware of all pertinent judgments rendered by . . . [the judicial] branch."[7] Here, Congress, in codifying the MFJ's restrictions on BOC provision of interLATA services used the term "provide" as it had been

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[3] United States v. Western Electric Co., Inc., 627 F.Supp. 1090, 1099 (D.D.C. 1986), *app. dismissed in rel. part* 797 F.2d 1082 (D.C.Cir. 1986), *cert. denied* 480 U.S. 922 (1987).

[4] Id. at 1100 - 1103; United States v. Western Electric Co., Inc., 673 F.Supp. 525, 541, fn. 69 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C.Cir. 1990), *cert. denied sub nom* MCI Communications Corp. v. United States, 498 U.S. 911 (1990).

[5] United States v. Western Electric Co., Inc., 675 F.Supp. 655, 665 (D.D.C. 1987), *aff'd* 894 F.2d 1387 (D.C.Cir. 1990).

[6] Davis v. Michigan Department of Treasury, 489 U.S. 803, 807 (1989) ("In view of the similarity of language and purpose between the constitutional principle of nondiscrimination and the statutory nondiscrimination clause, and given that § 111 was consciously drafted against the background of the Court's tax immunity cases, it is reasonable to conclude that Congress drew upon the constitutional doctrine in defining the scope of the immunity retained in § 111.")

[7] U.S. v. Barlow, 41 F.3d 935, 943 (5th Cir. 1994); CIR v. Keystane Consolidated Industries, Inc., 508 U.S. 152 (1993); Scheidemann v. INS, 83 F.3d 1517, 1525 (3rd Cir. 1996);U.S. v. Langley, 62 F.3d 602, 605 (4th Cir. 1995), *cert denied* 116 S.Ct. 797 (1996); In re Haas, 48 F.3d 1153, 1157 (11th Cir. 1995).

used in the MFJ and extended the interLATA prohibition to "services" as the MFJ had done. In so doing, Congress must be presumed to have known that Judge Greene read the term "provide" to encompass marketing and sales and interpreted the term "services" to encompass not merely interexchange transmission, but activities that comprise the business of providing long distance service. Absent an express statement to the contrary, it must further be presumed that Congress intended to adopt the interpretation placed by Judge Greene on the terms it borrowed from the MFJ to restrict BOCs from providing interLATA services.[8]

Given the well established presumption that Congress was cognizant of pertinent judicial rulings, it was incumbent upon Congress to state otherwise if it did not intend for Judge Greene's reading of the terms of the MFJ's interLATA prohibition to govern interpretation of the same words when incorporated into Section 271. This it did not do. "Where Congress knows how to say something but chooses not to, its silence is controlling."[9]

A second well-established rule of statutory construction is also pertinent here. "In determining the meaning of . . . [a] statute, [a court] . . . look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."[10] "[I]f the statutory language gives rise to several different interpretations, . . . [the court] must adopt the interpretation

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[8] Differences in the definitions of "telecommunications" and "telecommunications services" between the Act and the MFJ are of no consequence here because Congress used in drafting Section 271 the specific words of the MFJ upon which Judge Greene relied in concluding that marketing of interexchange services violated the MFJ prohibition against BOC provision of interLATA services.

[9] In re Haas, 48 F.3d 1153 at 1157, *citing* BFP v. Resolution Trust Corp., 114 S.Ct. 1757, 1761 (1994).

[10] Crandon v. U.S., 494 U.S. 152, 158 (1990); U.S. ex rel. Findley v. FPC-Boron Employees Club, 105 F.3d 675 (D.C. Cir. 1997), *rehearing denied*; Adler v. CIR, 86 F.3d 378, 380 (4th Cir. 1996); American Airlines v. Austin, 75 F.3d 1535, 1539 (Fed. Cir. 1996); Wassenaar v. Office of Personnel Management, 21 F.3d 1090, 1092 (Fed. Cir. 1994), *rehearing denied.*

which 'can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'"[11]

Here, the purpose of Congress is clearly stated. As the Commission has often declared, the "overriding goal" of the Telecommunications Act was and is "to open all telecommunications markets to competition."[12] Congress designed an intricate regulatory scheme of incentives and disincentives, rights and obligations in order to realize this goal. Recognizing that BOCs have "little, if any, incentive to assist new entrants in their efforts to secure a share of the BOCs' markets," Congress "required BOCs to demonstrate that they have opened their local telecommunications markets to competition *before* they are authorized to provide in-region long distance services."[13] "Section 271 thus creates a critically important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications market."[14]

As TRA emphasized in its comments supporting the Sprint Petition, the Ameritech "teaming arrangement" is a "Trojan Horse" by means of which Ameritech can effectively enter the in-region, interLATA market without first fully opening its local markets to competitive entry. As TRA explained, the "teaming arrangement" Ameritech has entered into with Qwest will allow Ameritech to build a "customer base in waiting" unhindered by its failure to satisfy the market-

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[11] In re Arizona Appetito's Stores, Inc., 893 F.2d 216, 219 (9th Cir. 1990) (*citing* U.S. v. 594,464 Pounds of Salmon, 871 F.2d 824, 827 (9th Cir. 1989), *quoting* NLRB v. Lion Oil Co., 352 U.S. 282, 297 (1957)).

[12] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd. 20543, ¶ 10 (1997).

[13] Id. at ¶ 14 (emphasis in original; footnote omitted).

[14] Id. (footnote omitted).

opening requirements of Sections 251.[15] This, of course, would negate the regulatory scheme created by Congress to incent BOCs to fully open local telecommunications markets to competition, eliminating the sole economic reason BOCs arguable had to relinquish their monopoly bastions.

Hence, an interpretation of Section 271 which permits BOCs to engage in "teaming arrangements" with IXC partners runs directly counter to the "objects and policies" of the Telecom Act. In contrast, reading Section 271 consistently with Judge Greene's interpretation would be "harmonious with its scheme and with the general purposes that Congress manifested."

Nor are the BOC Opponents correct that Commission precedent requires a reading of Section 271 which sanctions "teaming arrangements" among BOCs and IXC partners. In its *Non-Accounting Safeguards Order*, the Commission noted only that "section 272(g) is silent with respect to the question of whether a BOC may align itself with an unaffiliated entity to provide interLATA services prior to receiving section 271 approval," and that "'teaming' activities," if found lawful, would be subject to "any equal access requirements . . . that were imposed by the MFJ . . . until the BOC receives section 271 authorization."[16] As TRA emphasized in its comments, however, the

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[15] As TRA emphasized in its comments, customers secured by Ameritech for its IXC partner would deal with Ameritech exclusively with regard to their telecommunications service needs. Ameritech would sign the customer up for interexchange service and thereafter perform all customer service and billing functions. Service offerings would be priced and structured consistent with Ameritech's business objectives. And, perhaps most telling, Ameritech would be contractually entitled upon termination of the "teaming arrangement" to contact and secure as customers for its own in-region, interLATA service all of the customers it had secured for its IXC partner and with whom it had been dealing exclusively.

[16] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd. 21905, ¶ 293 (1996), *recon.* 12 FCC Rcd. 2297 (1997), *pet. for rev. pending sub nom.* SBC Communications Corp. v. FCC, Case No. 97-1118 (D.C. Cir. Mar. 6, 1997), *remanded in part sub nom.* Bell Atlantic Tel. Cos. v. FCC, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon on remand* FCC 97-222 (released June 24, 1997), *aff'd sub nom* Bell Atlantic Tel. Cos. v. FCC, Case No. 97-1067 (D.C. Cir. Dec. 23, 1997).

silence of Section 272(g) simply confirms that "teaming arrangements" between BOCs and IXC partners involving the sale of in-region, interLATA service are not permitted under Section 271. When Congress intended to carve out "teaming" exceptions to MFJ-based restrictions on BOC activities, it did so expressly, as it did with respect to electronic publishing in Section 274(c)(2)(B).[17] Moreover, when it did so, Congress qualified these grants of authority with safeguards adequate to protect consumers and competitors from anticompetitive abuses. Another well-established rule of statutory construction provides that where a statute contains an explicit exception in one section, but omits it in another, an exception should not be implied where it has been excluded.[18]

While the Commission has found that "BOC participation in sales agency, marketing, and/or various compensation arrangements in connection with alarm monitoring services does not necessarily constitute the provision of alarm monitoring under section 275(a)," it has also recognized that "there may be certain situations where a BOC is not directly providing alarm monitoring service, but its interests are so intertwined with the interests of the alarm monitoring service provider that the BOC itself may be considered to be 'engag[ed] in the provision' of alarm monitoring in contravention of section 275(a)."[19] The Commission suggested that with respect to alarm monitoring, it might take as much as a "financial stake in the commercial success of . . . [a] provider

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[17] 47 U.S.C. § 274(c)(2)(B).

[18] Detweiler v. Pena, 38 F.3d 591, 594 (D.C.Cir. 1994); Cramer v. CIR, 64 F.3d 1406, 1412 (9th Cir. 1995), *cert. denied* 116 S.Ct. 2499 (1996); Export Group and Reef Industries, Inc., 54 F.3d 1466, 1473 - 74 (9th Cir. 1995).

[19] Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services (Second Report and Order), 12 FCC Rcd. 3824, ¶¶ 37 - 38 (1997), *vacated sub nom.* Alarm Industry Communications Comm. v. FCC, 131 F.3d 1066 (D.C. Cir. 1997)..

. . . [to] constitute the 'provision' of alarm monitoring service."[20] Much less is required with respect to interLATA services. As Judge Greene long ago found, marketing of interLATA service alone is enough to constitute the provision of such services within the context of restrictions on BOC provision of interLATA services.

Putting aside its direct conflict with Section 271, the BOC Opponents further claim that the Ameritech "teaming arrangement" would pass muster under Section 251(g) if the arrangement was simply made available to all IXCs. If a BOC were to make its "teaming arrangement" ubiquitously available and all IXCs were compelled to participate as a result of the BOC's market power, the BOC would effectively control the in-region, interLATA market to the same extent it controlled the local market, dictating prices and other terms and conditions of service to its IXC partners. It was precisely to avoid such leveraging of market power that Judge Greene read the MFJ to prohibit BOCs from engaging in the business of providing interexchange services. As Judge Greene declared with reference to another arrangement involving BOC marketing of interLATA services, "[w]hatever one might think of the desirability of such an arrangement in the abstract, it is apparent that, given the historical experience with manipulation and discrimination by those in control of monopoly bottlenecks in the telecommunications market, it is not one to be repeated in slightly different form."[21]

Moreover, any claim that a marketing/service arrangement struck by a BOC with a given IXC partner is available to all others is essentially a sham. By necessity, such large-scale

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[20] Id. at ¶ 39.

[21] United States v. Western Electric Co., Inc., 627 F.Supp. 1090 at 1103. Judge Greene also found that endorsement of the quality of an IXC's service by a BOC "violated the non-discrimination provision" of the MFJ. United States v. AT&T, C.A. No. 82-0192, 3 (D.D.C. filed April 11, 1985).

business arrangements must be carefully tailored to the unique attributes of the contracting IXC in order to viable. It belabors the obvious to suggest that an arrangement which is workable for one IXC likely will not be workable for many, if not most, others. True nondiscrimination would entail the BOC entering into multiple service arrangements with other IXCs, each of which is carefully tailored to fit theindividual IXCs unique circumstances. Of course it would be impossible to determine whether all carriers were being treated comparably in such individual negotiations, rendering the nondiscrimination obligation meaningless.

Further, it is not at all clear how marketing arrangements struck by a BOC with multiple IXCs could ever be nondiscriminatory in practice. How would a BOC market the interLATA services of multiple IXC partners without preferring one over another. The nightmare of policing marketing campaigns to detect favoritism demonstrates clearly why "teaming arrangements" such as that Ameritech has entered into with Qwest should not be sanctioned.

Finally, BOC claims that "teaming arrangements" further the public interest can be readily dismissed. The Congress and the Commission have already determined that the public interest will be best served by ensuring that "local telecommunications markets are and will remain open to competition."[22] As succinctly stated by the Commission in addressing the public interest standard applicable to BOC provision of in-region, interLATA services, "[i]n adopting section 271, Congress mandated, in effect, that the Commission not lift the restrictions imposed by the MFJ on BOC provision of in-region, interLATA services, until the Commission is satisfied on the basis of an adequate factual record that the BOC has undertaken all actions necessary to assure that its local

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[22] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd. 20543 at ¶ 392.

telecommunications market is, and will remain, open to competition."[23] In other words, the public interest is far better served by realization of the Congressional goal of opening all telecommunications markets to competition, then by the creation of loopholes designed to avoid market-opening obligations.

By reason of the foregoing, the Telecommunications Resellers Association once again urges the Commission to issue a declaratory ruling that the "teaming arrangement" Ameritech has entered into with Qwest violates the restrictions imposed by Section 271 on BOC provision of in-region, interLATA service, as well as the equal access and nondiscrimination requirements referenced in Section 251(g) of the Act. TRA further urges the Commission to order Ameritech to immediately cease and desist from participating in such unlawful "teaming arrangements".

Respectfully submitted,

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[23] Id. at ¶ 386.

CERTIFICATE OF SERVICE

I, Catherine M. Hannan, hereby certify that a true and correct copy of the foregoing document has been served by United States First Class Mail, postage prepaid, to the individuals listed below, this 19th day of June, 1998:

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